



IN THE
Supreme Court of the United States

No. **77-2324**

OCTOBER TERM, 1976

THOMAS LI PUMA,

Petitioner,

-against-

COMMISSIONER, DEPARTMENT OF CORRECTIONS,
STATE OF NEW YORK, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

NANCY ROSNER
Attorney for Petitioner
401 Broadway
New York, N.Y. 10013

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JUDGMENTS AND OPINIONS BELOW

This petition seeks issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered July 11, 1977 —F2d—, Docket No. 77-2006 (Slip op. at 4657),* reversing an order of the United States District Court for the Southern District of New York granting the petition for a writ of habeas corpus unless within 60 days the New York courts permitted the petitioner to make a motion to suppress. See *U.S. ex rel Nancy Rosner on behalf of Thomas Li Puma v. Commissioner, New York State Department of Corrections*, 421 F. Supp. 781 (SDNY 1976).

JURISDICTION INVOKED

The petitioner seeks the issuance of a writ of certiorari pursuant to 28 USC §1254(1).

* The Court's opinion is reproduced *infra* at p. 1a.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

IV A, U.S. Constitution, prohibition against unlawful searches and seizures.

VI A, U.S. Constitution, guarantee of the effective assistance of counsel.

28 USC §2254.

§710.40 New York Criminal Procedure Law.

QUESTIONS PRESENTED

I

WAS THE PETITIONER AFFORDED A FULL AND FAIR OPPORTUNITY, WITHIN THE MEANING OF *STONE v. POWELL*, 428 US 465 (1976), TO LITIGATE HIS FOURTH AMENDMENT CLAIMS IN THE STATE TRIAL COURT WHERE THE DISTRICT COURT FOUND, AFTER AN EVIDENTIARY HEARING THAT: THE PETITIONER INFORMED COUNSEL OF THE BASIS FOR HIS FOURTH AMENDMENT CLAIMS; COUNSEL FALSELY ASSURED PETITIONER THAT A TIMELY, PRE-TRIAL MOTION TO SUPPRESS HAD BEEN MADE WHEN, IN REALITY, COUNSEL FAILED TO MAKE THE MOTION AS A RESULT OF NEGLIGENCE, NOT STRATEGY, AS A RESULT OF WHICH THE STATE TRIAL COURT REFUSED TO ENTERTAIN A MID-TRIAL MOTION TO SUPPRESS.

II

DID THE PETITIONER DEMONSTRATE CAUSE AND PREJUDICE, WITHIN THE MEANING OF *WAINWRIGHT v. SYKES*. —US— (JUNE 23, 1977), FOR

HIS COUNSEL'S NEGLIGENT PROCEDURAL DEFAULT IN FAILING TO MAKE A TIMELY PRE-TRIAL MOTION TO SUPPRESS WHERE THE CAUSE WAS SOLELY ATTRIBUTABLE TO COUNSEL'S NEGLIGENCE AND PREJUDICE WAS DEMONSTRABLE FROM THE STATE TRIAL COURT'S STATEMENTS ON THE RECORD CONCERNING THE MERIT OF THE SUPPRESSION MOTION WHICH CONCERNED EVIDENCE CRUCIAL TO THE STATE'S CASE.

III

ON THE ISSUE OF PREJUDICE, WAS THE DISTRICT COURT CORRECT IN APPLYING THE STANDARD THAT THE PETITIONER WAS PREJUDICED UNLESS THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

IV

DID COUNSEL'S NEGLIGENCE IN FAILING TO MAKE A TIMELY PRE-TRIAL MOTION TO SUPPRESS AND MISCONDUCT IN FALSELY INFORMING PETITIONER THAT IT HAS BEEN MADE, DEPRIVE PETITIONER OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

STATEMENT OF THE CASE

Procedural History of the Case

The petitioner was arrested on the evening of January 10, 1972 along with two co-defendants, James Doyle and Peter Raimondo, in connection with the burglaries of two suites at the Berkshire Hotel. The defendants were arraigned on the indictment on March 7, 1972 when

Lawrence Hochheiser, Esq. filed a notice of appearance on behalf of James Doyle. Apparently for reasons of convenience, pursuant to a not uncommon procedure in New York state courts, Mr. Hochheiser also represented Mr. Li Puma, in name only, until May 16, 1972 when Michael Coiro was substituted as counsel.

In the weeks preceding Coiro's entry into the case Hochheiser filed a motion to suppress solely on behalf of his client, Mr. Raimondo. At the time of Coiro's initial appearance in the case an adjournment was granted, over the People's answer of ready, to permit defense counsel to make pretrial motions. Mr. Coiro indicated that Mr. Li Puma had, the previous evening, begun relating the circumstances of the case to him and additional time was required to formulate and prepare all necessary pretrial motions. An adjournment for that purpose until May 30, 1972 was granted. Though an "omnibus" motion was filed including requests for a bill of particulars and for inspection of the grand jury minutes and dismissal of the indictment, no motion to suppress was ever filed by Li Puma's counsel nor was Hochheiser's motion joined in on the record.

James Doyle pled guilty on May 3, 1973. Sometime prior to James Doyle's plea of guilty the prosecution had made the police officers available to the defense for interviewing. Mr. Quagliata, on behalf of Mr. Li Puma, arrived at the conference late and was informed by Mr. Hochheiser, rather than the witness officers, that they would testify that Doyle had consented to the search of his hotel room though in plain view were the proceeds of a recent burglary draped outside a suitcase on one of the two twin beds in the small hotel room.

Both lawyers concluded the motion was meritorious because of the inherent implausibility of the proposed testimony, corroborated by both clients' separate and independent statements to their counsel that the police

forced entry into the suite and, having illegally entered, found no proceeds until a thorough search of the room was made, with the suitcase ultimately located under a bed.

Some time during the summer of 1972, the defense employed James McNally, a retired first grade detective of the New York City Police Force as a licensed investigator to gather evidence to support the motion to suppress and the defense at trial. McNally's efforts on behalf of the defense disclosed evidence relevant to the motion to suppress and sought exclusively for that purpose. He interviewed hotel employees and obtained statements that Suite 612, the room adjoining the suite where the defendants were arrested, had been forcibly entered by the police on the night of the burglary and that the police, at some point that evening, might have been given master keys by some hotel employee. These facts further confirmed the defendants' claims that Doyle had not consented to the search.

Then in July or August, 1972, armed with the results of McNally's efforts, Mr. Li Puma was advised by Coiro and Quagliata that a motion to suppress had been filed on his behalf. However, no motion was ever made, and no pretrial hearing was sought.

For the first time, mid-trial, Mr. Coiro requested a hearing on a motion to suppress. After lengthy consideration and colloquy, the court declined to entertain the motion to suppress. (See statement of the case, *infra*, at p. 23). With the questionable evidence thus submitted to the jury, the defendant was convicted and sentenced to five years imprisonment.

Present counsel was then retained to represent Mr. Li Puma. On the date of sentence, June 24, 1974 the court entertained a motion for a new trial predicated on three grounds. Foremost in the argument was the contention that the defendant had lost the right to make a meritorious motion to suppress through the gross dereliction of his trial counsel.

In connection with the question of the ineffective assistance of counsel, Mr. Li Puma asked for a hearing to prove that he had been advised by Coiro and Quagliata that the motion to suppress had been made. The trial court declined to hold a hearing and made no factual findings on the defendant's offer of proof. All applications were denied. In due course the conviction was affirmed by the Appellate Division without opinion, and the New York Court of Appeals denied leave to appeal.

Li Puma then brought an application in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. §2254 presenting these claims. The Honorable William C. Connor ordered an evidentiary hearing on Li Puma's claim of ineffective assistance of counsel.

Subsequent to the hearing, the district court issued an order providing that the writ of habeas corpus would issue unless within sixty days the state provided the petitioner the opportunity to make his motion to suppress.¹ The Attorney General successfully sought a stay of that order.

The Trial and the Unmade Motion to Suppress

The first three counts of the six count indictment charged burglary, grand larceny and possession of stolen property arising out of the Geibel burglary while the second three charged the same statutory violations relating to the Robinson burglary.

As its main witness, the People called Helen Geibel who related that, upon returning to their hotel suite with her husband on the evening of January 10, 1972 she encountered a man sitting at the desk and rifling through it. She questioned his purpose there. He responded he was part of the hotel security force and was investigating some

1. The petitioner is presently at liberty on bail after having served 16 months of his 5-year sentence.

burglaries. At this point her husband took over and requested credentials from the stranger. Seizing upon the request to facilitate his departure, the stranger promised to return with proper identification right away. In the meanwhile, two other men emerged from the suite's bedroom area and also made a hasty departure. All three were followed to the elevator by Mr. Geibel.

Mr. Geibel then telephoned the hotel staff who summoned the police. Within moments patrolmen arrived and questioned the Geibels who were able to provide only the vaguest of descriptions of the intruders: three white males, two of them Latin types.

Later that evening the Geibels viewed three lineups each containing one of the defendants. Mr. Geibel was unable to make any identification of anyone. Mrs. Geibel identified only Li Puma as the man who had been seated at the desk.²

At the trial³ Mrs. Geibel was to repeat the iden-

2. Despite the apparent certainty of her facial identification, Mrs. Geibel insisted that Li Puma's clothing in the lineup was different from that worn by the man in her room. However, when arrested within minutes after the burglary, Li Puma was wearing blue pants and a white shirt; the only change in his clothing being the addition of the blue suit jacket during the lineups. Mrs. Geibel insisted that the man identified at the lineups had changed into a different business suit. However, none of the police officers remembered Li Puma changing clothes before the lineups.

3. The transcript indicates that the night before her in-court identification Mrs. Geibel was visited at her hotel by Assistant District Attorney Kreidman who refreshed her recollection with a single photograph:

"REDIRECT EXAMINATION

BY MR. KREIDMAN

Q. Mrs. Geibel, do you remember I visited you in your hotel last night?

tification of Li Puma as the man at the desk with certainty despite her admission that she wasn't looking at his height and didn't remember anything about his hair.

To prove the second burglary the People offered the testimony of William Robinson. He and his wife returned to their suite on the evening of January 10, 1972 and discovered that it had been burglarized during their absence. Taken from the suite were one leopard coat, one mink jacket, one pair of cuff links, one ladies pin, one antique chain necklace and one ladies solitaire diamond engagement ring.⁴ At the time of the arrest part of the proceeds of the Robinson burglary⁵ were recovered in the defendant Doyle's hotel room.

A. Yes.

Q. And do you remember my showing you any photograph?

A. You showed me photographs.

Q. I showed you photographs or —

A. A photograph, yes.

Q. A photograph, do you remember which photograph I showed you?

A. I don't remember, no. You said that these were photographs, that's all.

Q. All right. Did I show you — How many did I show you?

A. Three.

Q. Did I show you all three or did I show you one?

A. I don't remember.

Q. Okay. I don't remember either. " (emphasis supplied).

4. The transcript reveals that the antique gold chain necklace and the ladies diamond ring were never recovered. Given the People's theory of the case, that all three defendants were arrested shortly after the burglaries in a small room in the hotel without having left the hotel, the failure to recover two costly items from the Robinson burglary is a small, but disquieting fact.

5. At the close of the People's case counts 4, 5 and 6, relating to the Robinson burglary, and all evidence offered in support of those counts including the recovered property and Mr. Robinson's testimony were stricken because of the lack of evidence to connect them with Li Puma.

Apart from the Geibel identification testimony, the only other evidence against Li Puma derived from the entry, search and arrest in suite 613, all of which would properly have been the subject of a motion to suppress because of the manner of the police entry into the room.

Police officer DeBona testified that at 8:30 p.m. on January 10, 1972 he was on radio patrol when he received a communication concerning a burglary at the Berkshire Hotel. His was the first police car at the scene. He interviewed the Geibels in their room, then participated in the search of the hotel. Though he did not participate in the entry of Doyle's room, Officer DeBona is a figure of some importance. Though he was one of the first of a small number of police officers who interviewed the Geibels, he was one of several police officers who participated in the burglary investigation and were placed in a lineup for viewing by the Geibels a scant two hours later. Indeed, while the lineup was in progress, Mrs. Geibel informed the police that she recognized officers in the lineup who had earlier been at the hotel. Police officer Newham testified that he was working with DeBona on patrol that evening and participated in the search of the hotel and helped to check out new hotel guest registrations.

Detective William Donnelly was also on radio patrol on the evening of January 10, 1972. He responded to the Berkshire Hotel call by proceeding to Suite 1710 where he found Newham and DeBona interviewing the Geibels. His first assignment was a search of the lower floors of the hotel. His next assignment was to check the occupants of two suites 612 and 613 whose occupants had registered that day. He proceeded first to room 613 and gave the following narrative of events there:

"Q. Did you go to room 613?

A. Yes I did.

Q. And tell the members of the jury what happened when you got to room 612? (sic).

A. Well, we knocked on the door and someone answered, 'Who is it?' We said it was police. He said, 'What do you want? and we said, 'There was a number of burglaries in the building and that we thought either his room was burglarized, or possibly could be burglarized, could we come in.'

Q. What happened?

A. Well, there was a pause, then the door opened.

Q. How long a pause was it, sir?

A. Oh, about a minute, two minutes."

"Q. It was about a minute before the door was opened, is that correct, sir?

A. To the best of my recollection, yes.

Q. Tell us what you saw when the door was opened.

A. There was a man standing there in his underwear.

Q. Did you later ascertain his identity?

A. Yes.

Q. What is his name?

A. James Doyle.

Q. And what did Mr. Doyle do?

A. He let us in.

Q. Did he say anything before he let you in?

A. He said that he was sleeping and that we woke him up.

Q. And did you — tell us what happened when he let you in.

A. Then we walked in and we were looking around the room. We looked under the beds and we saw Doyle looking over towards the closet.

Q. By the way, you say Doyle — what were the conditions of the beds?

A. Well, the bed nearest the window was made

and the bed closest to the closet was messed up like someone was sleeping there.

Q. You saw Doyle looking over to the closet?

A. Yes.

Q. Tell us what happened.

A. Well, I opened up the closet door to look in and I saw a hand by the shelf.

Q. Now, you looked into the closet and you saw a hand by the shelf. What did you do when you saw that?

A. I closed the door and I stated there's nothing here.

Q. Was there anything in the closet besides a hand that you saw?

A. Clothing.

Q. And what did you do then?

A. I motioned to my partner . . .

Q. Which one are you referring to?

A. Jimmy Greene. I snapped my fingers and I go, we got one in the closet. So he got ready, he took out his gun and we put Doyle against the wall and I said, 'come out. . .'

Cross-examination elicited more:

"Q. Before going to 613 did you search any other rooms in the hotel?

A. No, sir, I did not.

Q. You went directly to room 613?

A. I was so ordered, yes.

Q. You were so ordered. Now, you came to 613, is that correct?

A. Yes, sir.

Q. Tell me exactly what happened when you arrived at room 613?

A. I knocked on the door. A voice said, 'Who is it?' I stated it was the police. He said, 'What do you want?' I said something to the effect that there

were a number of burglaries committed in the building and that we have reason to believe that either your room was burglarized or would be burglarized.

Q. Now, when you had this conversation was the door open or closed?

A. Closed, sir.

Q. The door was closed?

A. Yes, sir.

Q. When was the door opened?

A. About a minute later.

Q. About a minute later. And did you walk right into the room at that point?

A. No, I had conversation with the man that opened the door.

Q. And the door was opened, is that correct?

A. Yes, sir.

Q. Now, while the door was opened could you see into the room?

A. No, sir.

Q. You could not see into the room?

A. I could see into the room partially.

Q. What portion of the room could you see?

A. I could see a dresser and I could see a window and I could see curtains.

Q. Now, this dresser that you saw, where was it?

A. It was on the left hand side of the wall.

Q. Well, from where you were standing at the door were you able to see the beds?

A. I may have been able to see the corner of one of the beds. I'm not sure.

Q. How far open did this man — question withdrawn. How far was the door open?

A. It was opened. I guess you call it fully.

Q. Open all the way?

A. Yes."

Officer Donnelly's version of events was important to the dormant motion to suppress because it eliminated plain view as the basis for a further penetration of the room.

Officer Richard Powers, also on motor patrol that evening, responded to the Berkshire call. His assignment was to accompany Officers Donnelly and Greene in their check of the new registrants in suites 612 and 613. His version of events there differed critically from Donnelly's:

"Q. Tell us what happened when you got to room 613, sire.

A. Patrolman Donnelly knocked on the door. A voice answered, 'yes.' Patrolman Donnelly said, 'We're New York City police. We'd like to speak to you.'

And there was a silence, and then, 'What's it all about?' I think were some of the words used, and one of us mentioned that we wanted to make sure that you were all right, there had been trouble in the building and we would like to make sure that you were all right.

After a brief moment, the door opened, a man stood there in boxer shorts. Patrolman Donnelly engaged him in a conversation.

I went past the man to the end of the room which the room was open. There were drapes. I looked behind the left drape.

Q. Let me get one thing clear. The window was open?

A. That's correct.

Q. And you looked behind the drapes?

A. That's right."

Q. Now, you said the door was opened, right?

A. Yes.

Q. Who was the first one into the apartment?

A. Well, I'd say it was Patrolman Donnelly. He

engaged the man with a conversation about a foot into the door, into the doorway, a foot and a half.

BY MR. COIRO:

Q. And then your testimony was, correct me if I am wrong, sir, that 'I walked past him into the apartment to the open window'?

A. That's right.

Q. In other words, you just pushed your way into that apartment?

A. No, I'm sorry, I didn't push my way in.

Q. Not that you physically pushed somebody, but the door was open and you stepped right through the apartment — right through the doorway into the apartment?

A. That's correct.

Q. That's correct, right?

A. I walked in.

THE COURT: I'm sorry, I didn't hear you.

THE WITNESS: I walked in.

BY MR. COIRO:

Q. And you walked in without any invitation, didn't you?

A. Without invitation?

Q. Yes.

A. No.

Q. In other words, Mr. Doyle said 'You may enter'?

A. Mr. Doyle didn't say anything.

Q. You just walked in?

A. When we had the conversation — that's correct."

Still a third narrative elicited by the court during recross examination of officer Powers confirmed the constitutional infirmity of the entry:

"THE COURT: Excuse me. Exactly what transpired when, as he opened the door, did he say

something to you when he opened the door, or did you say something to him as soon as he opened the door?

THE WITNESS: When he opened the door, I can't recall the exact words.

THE COURT: In substance.

THE WITNESS: Patrolman Donnelly engaged in conversation. It went something like. 'Are you all right, mister? Anybody in here that's not supposed to be?' Or something to that effect. We had been looking for people in the building that had committed a crime.

THE COURT: What did he say in response to your — Patrolman Donnelly?

THE WITNESS: He said something that he was sleeping.

THE COURT: And what did you do during this time?

THE WITNESS: I went right past the two of them.

THE COURT: I see.

BY MR. COIRO:

Q. You went right past?

A. Right past the two of them."

At this juncture there erupted on the record defense counsel's motion to suppress, hinted at by counsel's citation of standing cases on the record during Donnelly's testimony and referred to again after the critical Powers testimony. Clearly, in some off the record discussion, at least as early as Donnelly's testimony, the issue of the unmade motion to suppress had begun.

Defense counsel took the position that the motion had in fact been made, in that his partner Mr. Quagliata had joined Mr. Hochheiser's motion to suppress. In the Coiro-Quagliata professional association the division of labor was that Mr. Quagliata prepared the written submissions while

Mr. Coiro conducted the trial. Whether that joinder was a matter of record was uncertain.

In discussing the legal theories available to the people to justify the warrantless entry and search, the court openly stated that it would be inclined, based on the evidence thus far adduced, to find that Doyle had not consented and no emergency constituting exigent circumstances existed:

"THE COURT: I'm sure there are more closely analagous cases than that, Mr. Kriedman. If the apartment is searched to the detriment of why seized holding whether or not there is standing to challenge the search. (sic)

MR. KREIDMAN: There is another aspect, Your Honor, of a motion within trial and the Court can rule based on the evidence, based on the consent of Mr. Doyle and . . .

THE COURT: I would be inclined on the basis of what I have heard, Mr. Doyle didn't consent to a search of his apartment.

MR. KREIDMAN: Then also under *People v. Goldman*, 19 New York Second affirming Justice Ringel on the testimony of Officers Powers, the police common law right to search under emergency situations.

THE COURT: There wasn't any emergency situation here, Mr. Kreidman.

MR. KREIDMAN: The officer just testified . . .

THE COURT: What was the emergency situation?

MR. KREIDMAN: He thought the man was in trouble.

THE COURT: There was no basis for that conclusion. I'll find that as a matter of law as well, Mr. Kreidman.

You're not seriously suggesting when he knocks on the door of the room and the man

hesitates to open it and then he opens in his underwear he has a right to barge in and search the room because he thinks the man is in trouble?

MR. KREIDMAN: He hears there were burglars in the hotel.

THE COURT: And so therefore has a right to go into every room in the hotel and search every room in the hotel?

MR. KREIDMAN: That was in his mind.

THE COURT: I'm not concerned with what was in his mind, I'm concerned with what the law is.

MR. KREIDMAN: The law deals with what a reasonable man thinks.

THE COURT: I don't find that reasonable, Mr. Kreidman.

MR. KREIDMAN: All right, sir. if that's your decision that's your decision."

With his armament of warrant exceptions thus depleted, the people's position was dealt a mortal blow by the court's more emphatic statement of its position on the issue of standing:

"THE COURT: I am now holding, as a matter of law, the defendant has standing to bring this motion."

With the success of the suppression motion almost tangible, the prosecutor began to advance the waiver theory, now relied on in this Court. Thus, immediately after the Court's statement of its position on standing, the following ensued:

"Now, having disposed of that issue, Mr. Kreidman there remains the question of the — making the motion during trial.

What is the District Attorney's position with regard to that?

MR. KREIDMAN: Well, we cite, your Honor,

to the Court, 710.40 when made and determined—

THE COURT: Yes, Mr. Kreidman; go ahead.

MR. KREIDMAN: The motion may be made for the first time during trial, but only to previous unawareness of facts constituting the basis of which other factors the defendant did not have a reasonable opportunity to make the motion before trial.

THE COURT: Yes, the defendant's position is he did make the motion before trial.

MR. KREIDMAN: But he obviously waived it, sir. He went right into the trial without bringing it to the Court's attention or the District Attorney's attention.

THE COURT: Assuming that his statement of what occurred is accurate, and assuming that Mr. Coiro was erroneous when he advised this Court that he knew of only one motion, how is the District Attorney prejudiced by permitting the defendant to have this issue litigated at this point?

MR. KREIDMAN: Because he's waived it, sir, right in the middle of the trial.

THE COURT: That's how you're prejudiced?

MR. KREIDMAN: Certainly, sir.

THE COURT: How are you prejudiced?

MR. KREIDMAN: Let's assume, sir, that the defense wins its motion —

THE COURT: He didn't knowingly waive it, Mr. Kreidman.

MR. KREIDMAN: I would suggest he did."

The court's position on the waiver issue was justly sympathetic to Li Puma's plight:

"THE COURT: He's just explained the factor that his partner made the motion to join; he was unaware of it. Now, should a defendant for that reason alone, if he has a substantive right that goes

to the heart of the People's case, be deprived of his opportunity to have that right litigated on that technical ground?

MR. KREIDMAN: I would argue, yes.

THE COURT: That is the sole basis for your argument?

MR. KREIDMAN: That there's a waiver, yes, sir, there has been no evidence . . .

THE COURT: What is the prejudice to the District Attorney to allow him to litigate this at this time? Will you state to the Court what prejudice the District Attorney has suffered if I permit this matter to be litigated at this time?

(Pause).

THE COURT: The record will reflect a long silence on the part of the District Attorney.

I gather you are not prejudiced in any way.

MR. KREIDMAN: Except it's a violation of the statute, sir, 710.40."

As matters progressed and the ramifications of the successful motion to suppress became apparent, this "technical ground", so belittled by the court at first blush, became the altar of sacrifice for Li Puma's motion to suppress. Though the issue was raised on the first day of trial, during Donnelly's testimony, the granting of the motion required the striking from evidence of the fruits of the Robinson burglary and the police officers' testimony of Li Puma's emergence from the closet.

Recognizing the merit in the inevitable motion for a mistrial which would follow the striking of all the evidence except Mrs. Geibel's testimony, the court sought to exact a *quid pro quo* which defense counsel was quick to accept though it cavalierly abandoned the crucial mistrial motion and rendered meaningless the granting of the motion to suppress. The proposal was bluntly put:

"THE COURT: In view of the fact that I think that the District Attorney would be sorely prejudiced if it were necessary to declare a mistrial in this case, in view of the age of his complaint witness and the fact that they have come from several thousand miles away to testify in this trial, the fact that at this stage he has practically completed the presentation of the People's case and further view of the fact that this matter was not disposed of prior to trial by reason of the negligent failure of defense counsel to advise the court in advance of trial in response to the Court's specific questions as to whether any motions were pending, that there were no motions pending with regard to the suppression of physical evidence; it seems to me that unless defendant was fully prepared to waive any possible claim of prejudice he might have by the introduction into evidence of this matter The Court would under no circumstances consider the determination of a motion to suppress at this stage of the trial.

In view of the express waiver of any such show of prejudice by the defense counsel and by his client the Court will grant the defendant an opportunity to have the motion to suppress which was apparently made prior to trial resolved at this point."

Having extracted the bargain with defense counsel the court then inquired whether either side would offer further evidence on the motion. Probably prompted by the knowledge that he had no further evidence, the prosecutor resurrected his waiver argument which left the court still totally unmoved to accept the notion that the defendant had waived anything:

"MR. KREIDMAN: I didn't know. I didn't even know the court would grant the defendant's motion.

THE COURT: If you had read the cases you would learn that the law requires me to grant such a motion.

MR. KREIDMAN: When I saw the waiver section . . .

THE COURT: I saw no language that refers to waiver. *I see language that gives the Court discretion in determining whether or not to allow the hearing to be held during trial.*

MR. KREIDMAN: Well if I . . .

THE COURT: If you find me some cases that says the defendant under these circumstances has waived his right to a hearing I'll be glad to see those cases but again I suggest that you do some legal research first." (emphasis added).

With the motion to suppress thus sporadically in progress, the business of the trial continued before the jury. Officer James Greene, Officer Donnelly's partner and the third and last of the police present at the execution of the entry and search, recollected some additional evidence:

"Q. Tell us about the rest of the communication between your partner and Doyle.

A. Once the door to room 613 was opened by Doyle or Johnson, which was the first knowledge I had of the person, my partner conversed with him.

He did state, 'All right, search the premises — not to search the premises, but to come in and check the security of the premises.' "

The timing of Officer Greene's testimony, combined with the obvious, if not critical, importance of Doyle's alleged flirtation with a consent search might give a reasonable trier of fact pause. When considered against Doyle's extensive background as a professional criminal and the claim of the other officers that, once inside the room, the stolen furs were laying in plain view on a bed

strewn outside an open suitcase, the aroma of overzealous testimony arises.

Greene's further testimony turned healthy scepticism to moral certainty. Handing Officer Greene People's Exhibit 14 in evidence, a photograph of room 613, the prosecutor asked Greene to mark the spot where the fur laden Tourister luggage had been found:

"Q. I show you People's exhibit 14, in evidence (Exhibit handed to the witness).

Q. I ask you to mark thereon where the Tourister luggage was with the fur coats in it?

THE COURT: *Your testimony is that it's underneath the bed?*

THE WITNESS: *That's correct, Your Honor.*

THE COURT: *You may mark it.*" (emphasis added).

Both mark and mouth concurred. Plain view was plainly untrue.

To all appearances, all that remained was the oral argument prior to the court's decision of the motion to suppress.

With the success of the motion thus apparent, the focus suddenly shifted to the more technical terrain of waiver. Unable to produce a record which reflected the understanding of the parties that defense counsel's partner had joined Hochheisher's motion to suppress, the inquiry focused on the quality of the proof that in fact the motion had been joined, whether on or off the record. Where previously the court had unhesitatingly accepted defense counsel's unsworn representation of the fact,

"THE COURT: Mr. Coiro, as an officer of this Court, has testified the motion was made, and his partner has testified as an officer of the Court the motion was made.

MR. KREIDMAN: Sir, 'I was in a hotel last

week with Patrolman Greene checking out keys', and there is a bit of testimony as to when he made — and as to whether or not he checked out the key and with Room 1710. 'I don't remember that.' Memories are subject to failure.

THE COURT: They made a representation to this Court, Mr. Kreidman. Now, I'm accepting their representation.

MR. KREIDMAN: It's very simple for them, sir, to just order the minutes at that time. They made the representation it was on the minutes. Very simple to trace it down.

I would ask the court to impose that burden upon the —

THE COURT: Not if you have some doubt as to whether the motion was made.

MR. KREIDMAN: I certainly do.

THE COURT: What is the basis for your doubt?

MR. KREIDMAN: Human memory, taking place . . ."

New and more stringent conditions were imposed on defense counsel to prove the motion had been joined. Simply put, the Court demanded corroboration of defense counsel's representation from some official source. Not surprisingly, the trial justice before whom the motion has allegedly been joined had no recollection of the matter; nor did Assistant District Attorney Andrews, who was then in charge of the case. With the possibilities for corroboration thus exhausted, the trial court held that it was bound by the official record and declined to entertain the motion to suppress.

At the time of sentence, present counsel applied for a new trial on grounds of incompetence of trial counsel in failing to make the motion to suppress and requested an evidentiary hearing to prove that Li Puma had been told by his trial counsel that the motion to suppress had been

made. The request for a hearing and the application based on incompetency of counsel were denied.

REASONS FOR GRANTING THE WRIT

Recent opinions of this Court amply support the observation that the nature of federal habeas corpus jurisdiction to review state convictions is a matter of great judicial concern, affecting, as it does, so much of the work of the federal district courts. See *Stone v. Powell*, 428 US 465 (1976) and *Francis v. Henderson*, 425 US 536 (1976). In particular, the availability of federal habeas corpus jurisdiction to adjudicate fourth amendment claims arising in state cases is a new but important concept whose vague contours await definition by this Court. Indeed, it would belabor the obvious to discuss further the current importance of this subject.

This case warrants review by this Court primarily because it is factually uniquely suited to exploring these issues, combining as it does a procedural default attributable solely to counsel's negligence, not strategy, which operated to deprive petitioner of any state court decision on his federal claim but only after all evidence bearing on the federal claim had been adduced, the litigants had presented their views and the state trial judge had announced for the record his holdings on each sub-issue in the fourth amendment claim. Secondly, but not less importantly, this case warrants review by this Court because the merit of petitioner's federal claim is as obvious from the cold record as it was impressive to the state court judge who heard the witnesses testify. Yet no court has adjudicated his claim.

I

PETITIONER WAS NOT AFFORDED A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS FOURTH AMENDMENT CLAIMS IN STATE COURT

Generally state law governing the presentation and adjudication of suppression motions is codified principally in the form of rules of procedure. See, e.g. §710.40 New York Criminal Procedure Law, New York's version of a contemporaneous objection rule which governed the proceedings in this case. The sufficiency of such statutes must be assessed on two levels: on its face and as the statute is applied. Thus, where the invocation of a state procedural rule is discretionary, it may not be enforced to defeat a federal claim. The Supreme Court's opinion in *Williams v. Georgia*, 349 U.S. 375, at 382-3 (1955) emphasizes the need for federal scrutiny of the exercise of such discretion:

"A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. But, where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner."

For the purposes of this argument it may be assumed that §710.40 NYCPL was valid on its face. The next question is whether §710.40 vested the trial court with discretion to entertain petitioner's motion mid-trial. The

very wording of the statute, with its catch-all of unspecified "other factors" which might justify late making of the motion clearly vested the trial court with discretion to waive the procedural default. Indeed, from the time of counsel's first remarks concerning the suppression motion, until the trial court, ultimately declined to decide the motion, the court spent the better part of six days hearing evidence and arguments on the merits of the motion to suppress and decided that petitioner had standing and that the warrantless search could not be justified by exigent circumstances or consent. The court's discretion to decide the motion mid trial was never an issue. Nor did the trial court ultimately decline to decide the motion because it lacked discretion to do so.

Defense counsel stated that an oral agreement had been made with the district attorney that the petitioner would make a motion to suppress. Nothing in this agreement affected the timing of such a motion so that counsel should still have sought a pre-trial evidentiary hearing. The oral agreement merely dispensed with the need to file formal motion papers.

It is important to observe that the trial court, initially unhesitatingly accepted defense counsel's unsworn representation that the motion had been made pretrial:

"THE COURT: Mr. Coiro, as an officer of this Court, has testified the motion was made, and his partner has testified as an officer of the Court the motion was made.

MR. KREIDMAN: Sir, 'I was in a hotel last week with Patrolman Greene checking out keys', and there is a bit of testimony as to when he made—and as to whether or not he checked out the key and with Room 1710. 'I don't remember that.' Memories are subject to failure.

THE COURT: They made a representation to this Court, Mr. Kreidman. Now, I'm accepting their representation."

Later, after all efforts to produce a record of the agreement failed, the court held that it was "bound by the official transcript". Counsel's offer to testify under oath was totally rejected. Thus, the trial court did not as the finder of facts reject defense counsel's position for lack of credibility. Rather, it held, as a matter of law, not only that the offer of sworn testimony was insufficient, but that official corroboration on the issue was required.⁶ This is a paradigm case of unforeseeability, because of unconceived, novel state procedural requirements, totally insufficient to bar federal habeas corpus jurisdiction.

Thus, the conclusion of the Second Circuit that the trial court had no discretion to hear the motion mid-trial is at odds with the plain language of the statute; inconsistent with the state trial courts devotion of six days to the development of the merits of the claim and unsupported by the trial court's rationale that it lacked adequate proof of the oral agreement.

Rather, §710.40 as implemented here was a novel procedural requirement inaugurated to defeat petitioner's obviously meritorious federal claim. Through its application petitioner was deprived of the opportunity for full and fair litigation of his fourth amendment claims.

In its opinion the Second Circuit disposed of this issue with the observation that:

"In the present case, the district court noted in its opinion that all three points in petitioner's federal habeas corpus petition, including the claim that LiPuma had been ineffectively assisted by counsel in violation of the Sixth Amendment, had been raised and argued before the state courts, *United States ex rel. Rosner v. Commissioner*, 421 F.

6. Clearly, the enforceability of an agreement between prosecution and defense, such as was alleged here, in no way depends on the existence of an "official record". See *Palermo v. Warden of Green Haven Prison*, 545 F.2d 286 (2d Cir. 1976).

Supp. 781, 783 (S.D.N.Y. 1976). Accordingly, LiPuma certainly was afforded an "opportunity for full and fair litigation" of his constitutional claim in the State courts, and *Stone* must be applied here as an additional ground for reversal of the district court's order."

The court's opinion founders on the distinction between presentation and litigation and thus confuses the exhaustion requirement with the full and fair opportunity to litigate mandated by *Stone, supra*. Indeed, not only did the state court decline to decide petitioner's fourth amendment claim; the state judge also denied new counsel's motion at the time of sentence for a hearing on petitioner's Sixth Amendment claim.⁷ The Second Circuit's interpretation of this Court's holding in *Stone v. Powell, supra*, left uncorrected, can only spawn confusion and render meaningless the concept of a full and fair opportunity to litigate fourth amendment claims.

II

PETITIONER HAS DEMONSTRATED BOTH CAUSE AND PREJUDICE, WITHIN THE MEANING OF *WAINWRIGHT v. SYKES*. US (June 23, 1977)

Let us assume that §710.40 as applied provided a full and fair opportunity to litigate petitioner's fourth amendment claims. A second issue⁸ arises whether,

7. Such a hearing deemed necessary held in the federal district court to determine the circumstances surrounding counsel's failure to move to suppress.

8. While the distinction between these issues has not been the subject of much attention, it is adverted to in this Court's opinion in *Sykes, supra* at n. 11:

despite a valid state procedural barrier, petitioner can demonstrate cause and prejudice in connection with the waiver. The precise definition of these concepts was a matter left open in *Sykes* and particularly suited for resolution in this case.

Here, the district court found that the failure to make the motion resulted exclusively from counsel's negligence and not from any strategic consideration. Further petitioner did not concur in his counsel's error. Petitioner asked that the motion be made; hired an investigator for its factual preparation who uncovered evidence that the police had forced entry into another suite and had been given a master key for easier entries elsewhere. Finally petitioner was misled by counsel's statement that the motion had been made when it had not. Absent any concurrence by petitioner, counsel's negligence and misstatement certainly constitute cause within the meaning of *Sykes*.

As noted above, the record in this case affords a unique opportunity to explore the issue of prejudice. Here the state judge heard all evidence necessary to decide the motion and rendered opinions regarding each element of the motion—all of which favored petitioner. Indeed, reaching the merits of the fourth amendment claim would have required the granting of the motion. In addition, the trial court found that the questioned evidence went to the heart of the prosecution's case. The district court found the evidence sufficiently weighty so that its exclusion from the

"Petitioner does not argue, and we do not pause to consider whether a bare allegation of a *Miranda* violation, without accompanying assertions going to the actual voluntariness or reliability of the confession, is a proper subject for consideration on federal habeas review, where there has been a full and fair opportunity to raise the argument in the state proceeding. See *Stone v. Powell*, 428 U.S. 465 (1976). We do not address the merits of that question because of our resolution of the case on alternative grounds."

case was not harmless beyond a reasonable doubt.

On the issue of prejudice, the Court of Appeals held that the petitioner must demonstrate actual prejudice; not merely the potential for prejudice; nor that prejudice could not be ruled out beyond a reasonable doubt. The appropriate standard to be applied is discussed *infra* under Point III. For the purposes of this argument, it is assumed that a showing of actual prejudice is required.

The Court of Appeals' conclusion that actual prejudice was not demonstrated flows from its view that the motion to suppress was not "sufficiently supported." In light of the state court record a finding that the motion lacked merit and would not have been granted is difficult to comprehend and warrants some scrutiny of the Second Circuit's opinion.

At the outset the court noted that a credibility issue arising out of discrepancies in the testimony of various police officers formed the basis for the motion.⁹ Somewhere between this statement of the issues and the end of its opinion, the court resolved the credibility issue against the petitioner without any reference to the findings of the state court judge that petitioner had standing and that the warrantless search was justifiable neither on the basis of consent or exigent circumstances. Clearly, the state court would have granted the motion had it reached the merits and its findings, totally ignored by the court of appeals, are presumed to be correct. 28 USC §2254(d).

Further, the court's contention that there was a "paucity" of suppressible evidence under counts 1 and 2 is belied by both state and district court conclusions that the suppression motion went to the heart of the state's case,

9. The court's reference to findings the state trial jury was warranted in making concerning the arrest is incomprehensible since search and seizure issues are not within the province of a petit jury nor were they submitted to the jury in this case. Slip op. at 4660.

leaving only one witness' identification¹⁰ and eliminating the evidence of petitioner's discovery in the closet, with its inference of guilty knowledge, which was admissible and admitted under counts 1 and 2.

In light of the factual record developed in state court coupled with the findings of the state trial judge, it is difficult to imagine a habeas corpus petition presenting a more meritorious fourth amendment claim or more actual prejudice from its loss.

III

THERE IS A CONFLICT IN THE FEDERAL CIRCUITS' DEFINITION OF PREJUDICE WITHIN THE MEANING OF SYKES.

As noted above, the *Sykes* Court left open the issue of what prejudice need be shown to overcome a state procedural default. The Second Circuit employed an actual prejudice standard.

However, other federal circuits have not followed suit. In *Poulin v. Gunn*, 548 F2d 1379 (9th Cir. 1977) the court employed a traditional "harmless beyond a reasonable doubt" standard. In *Vitello v. Gaughan*, 544 F2d 17 (1st Cir. 1976) the court found that it was "apparent that no prejudice resulted," without further elucidation of the standard it employed. Thus, the circuits are already in disagreement concerning the appropriate test for measuring prejudice. This is particularly disconcerting to

10. The district court's assessment of Mrs. Geibel's testimony is amply supported by the record. The habeas court's reference to suggestive circumstances in her identification of petitioner surely refers to the fact that at the time of the lineup she recognized police officers in the lineup who had earlier questioned her at the hotel.

the uniform application of federal law because cases so frequently turn on the issue of prejudice. Indeed, *Sykes* was just such a case with this Court finding the other evidence so substantial that there was no possibility of actual prejudice.

This case is particularly appropriate for review on this point because of its unique factual setting; with a full evidentiary hearing and conclusions of law in state court but no actual decision on the merits. Further the standard employed by the Second Circuit is not workable. In its evaluation of the prejudice question, the court relied heavily on its assessment of the merit of the motion—a feat not easily accomplished where the only submissions are motion papers and no hearing on the merits has been held which is the usual fact pattern in these cases.

For this very reason the Second Circuit's interpretation of prejudice will virtually bar all such claims since the petitioner bears the burden of demonstrating actual prejudice but will usually lack the evidence to sustain his claim.

Nor is such a high standard necessary to protect the state's interests:

"In terms of the necessity for *Sykes* to show prejudice, it seems to me that the harmless error rule provides ample protection to the State's interest. If a constitutional violation has been shown and there has been no deliberate bypass—at least as I understand that rule as applied to alleged trial lapses of defense counsel—I see little if any warrant, having in mind the State's burden of proof, not to insist upon a showing that the error was harmless beyond reasonable doubt. As long as there is acceptable cause for the defendant's not objecting to the evidence, there should not be shifted to him the burden of proving specific prejudice to the satisfaction of the habeas corpus judge.

Wainwright v. Sykes, supra, concurring opinion of Mr. Justice White.

IV

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S NEGLIGENT FAILURE TO MAKE A MERITORIOUS SUPPRESSION MOTION AND COUNSEL'S MISSTATEMENT TO PETITIONER THAT THE MOTION HAD BEEN TIMELY FILED.

It arises from the natural order of our adversary system—that deprivation of the effective assistance of counsel will impair and sometimes totally obliterate other fundamental rights. The Sixth Amendment guarantee of the effective assistance of counsel is, in a pragmatic sense, the most crucial of rights since it is only through counsel that all other rights are asserted.

Countervailing these considerations, is the recognition that the defense of a criminal case, is both art and science, involving as it does the employment of strategy and the exercise of discretion. Nor are claims of ineffective assistance of counsel a recent trend. Standards for evaluating counsel's performance were formulated long before the development of other constitutional protections, primarily under the Fourth, Fifth and Sixth Amendments, which have radically altered criminal litigation. The contemporary criminal practitioner must be litigator and legal scholar.

Thus what constitutes the effective assistance of counsel corresponds directly to substantive and procedural developments in the criminal law. This notion perfectly reasonable on its face, is further reinforced by the corollary concept that the right to counsel exists at every critical stage of the criminal proceeding, not merely at trial.

Accordingly, counsel's performance at all phases of the case is subject to scrutiny.

Refining the concept slightly, it is also clear that failure to make a meritorious motion to suppress supports a claim of ineffective assistance of counsel. See *United States v. Easter*, 539 F.2d 663 (8th Cir. 1976).

In this case the habeas corpus court ordered a hearing on petitioner's sixth amendment claim. The facts which emerged from that proceeding were that petitioner informed his counsel of the factual basis for his fourth amendment contentions. Counsel then sought an adjournment to prepare, among others, a suppression motion. Petitioner retained an investigator who interviewed hotel employees and learned that the door to the suite adjacent to the room where petitioner was arrested had been damaged on the night of the burglary and the police had been given a master key. This evidence corroborated the co-defendant's statements that the police had entered without permission.

Counsel informed his clients that the suppression motion had been timely filed when it had not and thereafter forgot the motion to suppress until the second day of trial. The district court found that the mishap occurred because of a division of labor in counsel's law partnership which allocated the pre-trial motion practice to another attorney. The habeas court also found that counsel never intended to abandon the motion, and that strategy played no part in the procedural default. Because the motion encompassed all the evidence save one eye witness, the habeas court found petitioner had been deprived of the effective assistance of counsel under the Second Circuit's "farce and mockery of justice" standard.

The circuit court found its rigorous standard had not been met, though it left inviolate the district court's finding that no strategic consideration had contributed to the default. Rather the court justified its result with the ob-

servation that a contrary ruling would cause lawyers to file frivolous motions.¹¹

The Second Circuit has repeatedly refused to adopt a less stringent test for measuring counsel's competency despite the marked trend in other state and federal courts toward a reasonable competency test. See, *Rickenbacker v. Warden*, 550 F.2d 62, 65 (2d Cir. 1976); *United States v. Taylor*, slip op. at 2805, 2829 (2d Cir. April 13, 1977); *United States v. Rodriguez, et al.*, slip op. at 3429, 3435 (2d Cir. May 11, 1977); *United States v. Medico*, slip op. at 3795, 3812 (2d Cir. May 25, 1977); and *United States v. Bubar, et al.*, slip op. at 4519, 4536 (2d Cir. June 30, 1977).

To all appearances, unless is mandated to do so by this Court, the Second Circuit won't budge.

Mr. Justice Brennan's concurring opinion in *Sykes, supra* endorses a reasonable competence standard at least in cases such as this:

With respect to the necessity to show cause for noncompliance with the state rule. I think the deliberate bypass rule of *Fay v. Noia* affords adequate protection to the State's interest in insisting that defendants not flout the rules of evidence. The bypass rule, however, as applied to events occurring during trial, cannot always demand that the defendant himself concur in counsel's judgment. Furthermore, if counsel is aware of the facts and the law (here the contemporaneous objection rule and the relevant constitutional objection that might be made) and

11. The circuit court also sought support from petitioner's purported offer to waive all prejudice and a mistrial in return for the trial court's decision of the motion to suppress. As the record plainly demonstrates, the concession was a condition precedent to the decision of the motion to suppress and as such was the imposition of an unlawful penalty on petitioner's exercise of his fourth amendment rights. See Statement of the Case, *supra* at p. 20.

yet decides not to object because he thinks the objection is unfounded, would damage his client's case or for any other reason that flows from his exercise of professional judgment, there has been, as I see it, a deliberate bypass. It will not later suffice to allege in federal habeas corpus that counsel was mistaken, unless it is "plain error" appearing on the record or unless the error is sufficiently egregious to demonstrate that the services of counsel were not "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771."

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

NANCY ROSNER
Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 988—September Term, 1976.

(Argued April 12, 1977

Decided July 11, 1977.)

Docket No. 77-2006

THOMAS LiPUMA,

Petitioner-Appellee,

v.

COMMISSIONER, Department of Corrections,
State of New York, et al.,

Respondents-Appellants.

Before:

CLARK, *Associate Justice,**

ANDERSON and MULLIGAN, *Circuit Judges.*

Appeal by Respondents from the grant by the United States District Court for the Southern District of New York, Conner, *Judge*, of petitioner's application for a writ of habeas corpus because of inadequate representation by counsel.

Reversed.

* Pursuant to §0.14 of the Rules of this Court, this appeal is being determined by Judges Anderson and Mulligan who are in agreement on this opinion.

EILEEN SHAPIRO, Esq., New York, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, and Ralph McMurry, Assistant Attorney General, New York, N. Y., on the brief), *for Respondents-Appellants*.

NANCY ROSNER, Esq., New York, N. Y., *for Petitioner-Appellee*.

ANDERSON, *Circuit Judge*:

This is an appeal from a judgment entered September 24, 1976 vacating petitioner Thomas LiPuma's New York state conviction for a second degree burglary and petit larceny and granting a writ of habeas corpus pursuant to 28 U.S.C. §2254 unless the State commenced proceedings to retry the petitioner within 60 days of the judgment. Subsequently the district court on December 17, 1976 amended the judgment to provide instead that the writ of habeas corpus would issue within 60 days unless the State afforded petitioner an opportunity to make a motion to suppress certain evidence. *United States ex rel. Rosner v. Commissioner*, 421 F. Supp. 781 (S.D.N.Y. 1976) (hereinafter cited as *Rosner*).

On the evening of January 10, 1972, two robberies took place at New York's Berkshire Hotel. Mr. and Mrs. William Robinson returned to their room to find their two fur coats, a pair of gold cufflinks and other items missing. On the floor above the Robinsons, Mr. and Mrs. Raymond Geibel returned from a stroll to find an unknown individual sitting at the desk in the sitting room of their suite. Mrs. Geibel asked the stranger to identify himself, and he replied that he was a hotel security officer investigating

several reported burglaries in the hotel. Two more strangers next emerged from the Geibels' bedroom and likewise claimed to be hotel security men. Mr. Geibel demanded identification of the three, and they answered that they did not have any with them but that they would get it and return; they then departed. The Geibels noted that their rooms were in disarray and that a small pillbox, worth approximately five dollars and a small purse containing some change were missing.

The Geibels and the Robinsons immediately reported the incidents, and the police were summoned. They arrived within a very few minutes. The hotel's entrances were sealed and its hallways and stairwells were checked, but the intruders were not found. All of the guest rooms at the Berkshire, except those on the sixth floor, were leased to long term tenants. Only the rooms on the sixth floor were used for transients; and at the time of the burglaries, only three of these transient rooms had been rented. In examining the hotel register, the police discovered that Rooms 612 and 613 were occupied by persons who had recently registered. Three officers went to Room 613. Whom and what the officers discovered in Room 613 were largely undisputed, that is to say, three men, Doyle, Raimondo and the appellant LiPuma, and the Robinsons' furs, and the Geibels' pillbox. The manner and means by which those discoveries were made, however, have, for the purposes of this case, given rise to an issue of credibility as to the assertion by the police that their entry into Berkshire's Room 613 was with the consent of Doyle, the occupant, or without his consent, which in turn raises the issue of a Fourth Amendment violation. There is also a question whether LiPuma's Sixth Amendment right to "the Assistance of Counsel for his defence" was violated because his trial attorney failed to make a timely motion for suppression.

The three policemen sent to investigate Room 613, testified at petitioner's state court trial before a judge and jury that they had knocked at the door and announced themselves as police. The jury was warranted in so finding and also in determining that James Doyle, who was also charged with the burglaries along with LiPuma and one Peter Raimondo, came to the closed door, where Officer Donnelly told him that the police wanted to make sure he was all right because there "had been trouble in the building" After a minute, Doyle let them in.¹ As Officer Donnelly spoke with Doyle, Officer Powers went past him into the room without objection or protest. Donnelly then followed. He noted that Doyle kept looking nervously toward the closet, the door of which Donnelly opened and saw evidence that someone was inside. The policeman then drew his gun and ordered whoever was inside the closet to come out. LiPuma then emerged, followed by Raimondo. A search of Raimondo's pockets disclosed the Geibels' pillbox, which was later introduced at trial against LiPuma. LiPuma, Doyle and Raimondo were then arrested. On the night of the arrest, Mrs. Geibel identified LiPuma as the man she had encountered sitting at the desk upon entering her Suite.

The three defendants were later indicted on two counts each of second degree burglary, petit and grand larceny and two counts of criminal possession of stolen property.

Doyle's retained counsel, Attorney Hochheiser, initially represented LiPuma as well, but in May of 1972, LiPuma retained Michael Coiro as his own separate counsel, who

¹ One of the other policemen on the scene, Officer Green, testified that Doyle had invited the three policemen to check the room "for security purposes," but not to search. Doyle, who had pled guilty, testified at the trial in LiPuma's behalf and said that, after telling Raimondo and LiPuma to hide in the closet, he, Doyle, opened the door and, after he was rudely pushed aside by the police, they rushed in.

was assisted by his partner, Attorney Salvatore Quagliata, who prepared papers and handled pre-trial motions. After Coiro and Quagliata entered the case on LiPuma's behalf, Doyle's counsel, Attorney Hochheiser advised them that he had filed, on Doyle's behalf, a motion to suppress all evidence derived from the January 10, 1972 search of Room 613 at the Berkshire where LiPuma and Raimondo had been discovered in the closet, as well as where the physical evidence had been found.

Attorney Quagliata, in connection with his assigned duty to deal with pre-trial motions for LiPuma in the State court trial, discussed with Attorney Hochheiser, still representing Doyle, both a motion to suppress and a motion for a bill of particulars. They both testified at the subsequent United States District Court habeas hearing to an informal agreement before the state court trial, for a kind of division of labor, pursuant to which Attorney Hochheiser understood that Quagliata, on behalf of LiPuma, joined in Hochheiser's motion to suppress and Attorney Hochheiser, on behalf of Doyle, joined in Quagliata's motion for a bill of particulars. When this subject was examined by Justice Fraiman in the midst of the State court trial, Hochheiser testified generally, i.e., without a specifically detailed recollection,

"it had been my understanding over the period of that year, or whatever the pendency of that litigation was, that Judge Leff, who had been the previous judge in the case, and the prosecutor, Tom Andrews, and myself and Mr. Quagliata had all understood there was a time when Mr. Quagliata had told Judge Leff that he joined in my motion to suppress. I certainly understood I was the beneficiary of Mr. Quagliata's bills of particulars."

Quagliata understood this to constitute an oral stipulation which for the court and the parties, including the State, brought LiPuma under Hochheiser's motion to suppress. He also understood and believed that it was on the record. He told his senior partner, Attorney Coiro, about it and they both relied upon this understanding in seeking to have LiPuma's motion to suppress heard and ruled upon by Justice Fraiman in mid-trial of the case in the Supreme Court of New York. Due to the passage of time between the happenings testified to by Attorney Hochheiser and the actual trial in the State court, Andrews, the former prosecutor, no longer had any recollection of the matter one way or the other. Moreover an extended search failed to disclose that the oral stipulation was at any time made a part of the record. Attorney Hochheiser's motion to suppress on behalf of Doyle disappeared from the case on May 3, 1973, when Doyle pleaded guilty to the first count, charging second degree burglary.

The case against LiPuma continued and on May 16, 1972, Quagliata appeared before the New York Supreme Court and stated that "it would appear that there are some motions that lie." LiPuma was advised in July or August of 1972 by his attorneys that a motion to suppress had been filed on his behalf. A private investigator was hired at the joint expense of LiPuma and his co-defendants, with at least one of his duties being an investigation into the circumstances of the policemen's entry into Room 613 on the evening in question. In short, it appeared through the summer of 1972 and into 1973 that the case was being readied for trial. Immediately preceding the actual commencement of the trial, the state trial judge, Justice Fraiman, specifically asked Attorney Coiro if "there was any outstanding motion he required: and Attorney Coiro advised the court "that there were not."

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LiPuma was placed on trial on May 2, 1974, but as of that date no formal suppression motion had, in fact, been filed on his behalf. The prosecution presented the testimony of Mrs. Geibel, who had identified LiPuma in a police line-up on the night of the robbery. She also made a second identification of LiPuma in court. The State's case included the testimony of Officer Donnelly, one of the three policemen assigned to investigate Room 613 and that of Officer Powers, also part of the same detail. After the completion of Officer Power's testimony and on the second day of trial, LiPuma's counsel, Attorney Coiro, inquired of the trial judge as to his "request for a motion to suppress" Coiro explained that in a pre-trial proceeding before a different judge, "the People consented to a motion to suppress." After extensive side-bar discussions with counsel over the course of five days, the trial judge finally denied Coiro's motion to suppress on May 8, 1974, on the ground that §710.40 of the New York Criminal Procedure Law (NYCPL)² precluded the mid-trial consideration of the motion. The trial proceeded and LiPuma was convicted on jury verdicts of guilty on two of the three counts, that is, those relating to the Geibel burglary. The counts based upon the Robinson burglary were ultimately dismissed for insufficient evidence of connection with the accused. He was sentenced to five years imprisonment.

On the day of sentencing, LiPuma, who had discharged Coiro and his partner as his attorneys, moved, through new counsel, for a new trial on three grounds: (1) that he

² At the time of LiPuma's trial, NYCPL §710.40 provided in pertinent part:

"1. A motion to suppress evidence must be made . . . with reasonable diligence prior to trial.

2. The motion may be made for the first time during trial when, owing to previous unawareness of facts constituting the basis thereof or to other factors, the defendant did not have reasonable opportunity to make the motion before trial"

had lost the right to make a meritorious motion to suppress through the gross dereliction of his trial counsel; (2) that the evidence relating to the Robinson burglary, which had been struck from the evidence because of the dismissal of the counts relating to this robbery had nonetheless prejudiced him; and (3) that the Assistant District Attorney's summation had been improperly prejudicial. He also claimed that the court's instructions were not sufficient to remove the prejudice caused by the last two points. The state trial court held that petitioner had been adequately represented by counsel. The motion for a new trial was denied without a hearing and the Appellate Division affirmed the conviction without opinion. The New York Court of Appeals denied leave to appeal.

The instant petition for federal habeas corpus followed. The district judge held an evidentiary hearing on this petition on April 14, 1976, at which Hochheiser (Doyle's former attorney and LiPuma's first attorney) as well as Quagliata and Coiro, partners, who were LiPuma's second attorneys, testified. While the court had before it the trial transcript of LiPuma's State trial, neither Doyle nor Li Puma testified at the habeas corpus hearing.

The district court ruled that neither petitioner's claim that he had been improperly prejudiced by the prosecutor's closing statement nor the claim that evidence as to the Robinson burglary had prejudiced his cause, was supported by the trial court record. *Rosner, supra*, 421 F. Supp. 781, 782 *et seq.* As to the main issue before it, the claim of ineffective assistance of counsel because LiPuma's suppression motion had not been timely filed and pressed before the State trial court, the district court concluded that the suppression motion had been simply forgotten by Attorney Coiro. *Rosner, supra*, 421 F. Supp. at 788, and it thereby contradicted the State's suggestion that the motion to

suppress was not made simply because it had little chance of success.

From his factual finding, the district court then proceeded to determine whether, under the law of this Circuit, counsel's performance was so "woefully inadequate 'as to shock the conscience of the Court and make the proceedings a farce and a mockery of justice.'" *United States v. Currier*, 405 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969), even though "[e]rrorless counsel is not required." *United States v. Mantalon*, 445 F.2d 1215, 1218-19 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971). The district judge concluded that the charge of ineffective assistance of counsel was "fully supported by the peculiar facts disclosed by the record at bar," *Rosner, supra*, 421 F. Supp. at 792, because LiPuma's suppression motion would not "have been of obvious futility" and, had the motion been successful, the only evidence against LiPuma was Mrs. Geibel's identification testimony, which the district judge characterized as "dubious." *Rosner, supra*, 421 F. Supp. at 791.

On this appeal, the State argues first that petitioner waived his claim for purposes of federal habeas corpus review, citing *United States ex rel. Tarallo v. LaVallee*, 433 F.2d 4 (2d Cir. 1970), *cert. denied*, 403 U.S. 919 (1971), that the Supreme Court's recent decision in *Stone v. Powell*, 428 U.S. 465 (1976), forecloses review here inasmuch as petitioner had an opportunity for full and fair litigation, 428 U.S. at 494, to press his constitutional claims before the State courts and that LiPuma was not in any event deprived of the effective assistance of counsel under this Circuit's stringent standards for reviewing such claims. Petitioner counters with the arguments that as to waiver, the State has confused the concepts of intentional bypass of a state forum in the presentation of a federal claim, as expressed in *Fay v. Noia*, 372 U.S. 391 (1963), with the

opportunity for full and fair litigation doctrine of *Stone v. Powell*, *supra*, and that as to effective assistance of counsel, the district court properly applied this Circuit's tests for evaluating such claims, citing *Mosher v. LaVallee*, 491 F.2d 1346 (2d Cir.), *cert. denied* 416 U.S. 906 (1974); *United States v. Sanchez*, 483 F.2d 1052 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974); and *United States ex rel. Maselli v. Reincke*, 383 F.2d 129 (2d Cir. 1967).

With regard to the State's contention that petitioner has "waived" his Fourth Amendment claim for purposes of federal habeas corpus review because of his failure to comply with NYCPL §710.40, requiring that motions to suppress evidence be made prior to trial, it may be noted that the only exceptions recognized by the statute, in effect at the time of LiPuma's trial, to permit the later in-trial consideration of such motions, were in circumstances where the defendant did not have a reasonable opportunity to make the motion prior to trial "owing to previous unawareness of facts constituting the basis thereof or to other factors . . .," and in some limited situations not relevant here. The State cites *United States ex rel. Tarallo v. LaVallee*, *supra*, in support of its waiver theory and we agree that this case, decided under the NYCPL §710.40's predecessor statute, is applicable here.

Tarallo was likewise a habeas corpus proceeding stemming from a robbery conviction, where the search warrant and supporting affidavit which petitioner attacked had been on file with the State court five months prior to trial, but no pre-trial motion to suppress was made with respect to any evidence seized. The petitioner had failed to object on Fourth and Fourteenth Amendment grounds when the jewelry from the robbery had been introduced in evidence, and only objected on illegal search and seizure grounds after the State's evidence was already in. "At no point did he [Tarallo] request a factual hearing or did

he contend that the warrant was issued without probable cause." 433 F.2d at 7. On the above facts, this court held in *Tarallo* that failure to comply with §813-d of the New York Code of Criminal Procedure (the predecessor statute of NYCPL §710.40 applicable here) prohibited raising his Fourth and Fourteenth Amendment claims on a federal habeas corpus petition. 433 F.2d at 8. In the present case, petitioner likewise failed to comply with the State statute requiring him to make his motion to suppress prior to trial.

Petitioner attempts factually to distinguish *Tarallo* from his situation on the ground that he, unlike Tarallo, actually objected on constitutional grounds during trial to the introduction of allegedly impermissible testimony. The *Tarallo* court noted, however, that the trial court in that case had considered a mid-trial objection by petitioner's counsel as a motion to suppress, 433 F.2d at 7, substantially the same situation as developed here.

LiPuma also argues that *Tarallo* differs from this case because it was decided under §813-d of the New York Code of Criminal Procedure, which had been construed by the New York courts as precluding the mid-trial consideration of motions to suppress, whereas the present case is governed by §813-d's successor, NYCPL §710.40, which allegedly vested the trial court with discretion to entertain such mid-trial suppression motions. This argument is likewise without substance. A comparison of §813-d of the Code of Criminal Procedure (reproduced at 433 F.2d at 7, n. 4) with NYCPL §710.40 as it stood in May of 1974 (the time of LiPuma's trial—§710.40 was thereafter amended twice, on September 1, 1974 and September 1, 1976) reveals little if anything by way of substantive differences between the provisions. Further, it was not until September 1, 1974, four months after LiPuma's trial, that New York enacted NYCPL §255.20, dealing with general

procedure on all pre-trial motions and explicitly providing that the court "in the interest of justice and for good cause shown, may, in its discretion, at any time before sentence, entertain and dispose of the [pre-trial] motion on the merits." (Emphasis added.) The passage of NYCPL §255.20 lends further support to the view that at the time of LiPuma's trial, the trial judge did not have the discretion under the state law to hear this suppression motion at mid-trial. A failure to comply with NYCPL §710.40 has been shown, and *Tarallo, supra*, must be applied. This court said in *Tarallo, supra*, 433 F.2d at 8, "Tarallo failed to comply with 813-d of the New York Code of Criminal Procedure and therefore may not raise his objection on a habeas corpus petition." (Emphasis supplied.) The petitioner is, in the light of that decision, therefore, precluded from raising his objection to the admitted evidence. See also, *United States ex rel. Scott v. LaVallee*, 379 F. Supp. 111, 113-14 (S.D.N.Y. 1974).

While we find *Tarallo, supra*, applicable here, this does not dispose of petitioner's claim that the reason he failed timely to move for suppression of the challenged testimony and physical evidence was because of his attorney's alleged incompetence and ineffective assistance. As to LiPuma's claim under the Sixth Amendment that his counsel was incompetent, we are of the opinion that the district court misapplied prior rulings of this court, which, in declaring a standard for measuring ineffective assistance of counsel claims, is rigorous, primarily because petitioners are more likely than not to equate their failure to escape conviction with their counsel's alleged incompetence, regardless of the evidence against them and other circumstances attendant upon a particular trial, see, e.g., *Sclawek v. United States*, 413 F.2d 957, 958 (8th Cir. 1969). Accordingly, this court has been consistent in repeatedly holding that

"in order to be of constitutional dimensions the representation [must] be so 'woefully inadequate' as to shock the conscience of the Court and make the proceedings a farce and a mockery of justice." *United States v. Currier*, 405 F.2d 1039, 1043 (2d Cir.), cert. denied, 395 U.S. 914, 89 S.Ct. 1761, 23 L.Ed.2d 228 (1969), quoting *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950, 70 S. Ct. 478, 94 L. Ed. 586 (1950); see also *United States ex rel. Walker v. Henderson, supra*, 492 F.2d [1311] at 1312 [(2d Cir.), cert. denied, 417 U.S. 972 (1971)]; *United States v. Sanchez*, 483 F.2d 1052, 1057 (2d Cir. 1973) [cert. denied, 415 U.S. 991 (1974)]." *United States v. Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974).

In *Yanishefsky, supra*, an appeal from a conviction for introducing and attempting to introduce narcotic substances into a federal prison contrary to 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) and 18 U.S.C. §1791, appellant argued that her attorney should have requested a suppression hearing as to identification testimony of a corrections officer and an inmate which "allegedly 'was indisputably the product of an impermissibly suggestive' pre-trial photographic display" 500 F.2d at 1329. After a review of the testimony, this court ruled that the corrections officer's identification of the appellant was based on "his independent recollection of the events and that he was not relying on the photograph which he selected at the arguably impermissibly suggestive display." *Id.* at 1331. Further, in applying the "mockery of justice" standard to appellant's Sixth Amendment, ineffective assistance of counsel claims, the *Yanishefsky* court rejected counsel's invitation to adopt the less stringent standard of other Circuits that a defendant is entitled to "counsel reason-

ably likely to render and rendering effective assistance,' *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974), or that an accused be afforded counsel of 'normal competency.' *Moore v. United States*, 432 F.2d 730, 737 (3rd Cir. 1970) (en banc)." 500 F.2d at 1333, n. 2. More recent attempts to have this court re-examine the "farce and a mockery of justice test" of *United States v. Wight, supra*, 176 F.2d at 379, include *Rickenbacker v. Warden*, 550 F.2d 62, 65 (2d Cir. 1976); *United States v. Taylor*, slip op. at 2805, 2829 (2d Cir. April 13, 1977); *United States v. Rodriguez, et al.*, slip op. at 3429, 3435 (2d Cir. May 11, 1977); *United States v. Medico*, slip op. at 3795, 3812 (2d Cir. May 25, 1977); and *United States v. Bubar, et al.*, slip op. at 4519, 4536 (2d Cir. June 30, 1977). This court has consistently adhered to the *Wight* standard.

Turning to the facts of the instant case with the above principles in mind, it is necessary to examine the strength of the prosecution's case, *United States ex rel. Marcelin v. Mancusi*, 462 F.2d 36, 43 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973). The State presented the line-up and in-court identification testimony of Mrs. Geibel, who had entered her suite at the Berkshire Hotel to witness petitioner sitting at the desk in her sitting room and next saw LiPuma's accomplices emerging from her bedroom. The Geibels' subsequent examination of their room revealed the absence of the small pillbox, later found on the person of Raimondo. Mrs. Geibel was able to pick LiPuma out of a police line-up on the night of the robbery, a procedure challenged through a pre-trial suppression or "*Wade*" motion, by petitioner's allegedly incompetent trial counsel. A hearing on this motion was held on the day preceding the trial before State Supreme Court Justice Fraiman, the trial judge. He ruled that the evidence of the line-up identification was admissible. In addition, Mrs. Geibel made an in-court identification of LiPuma at the latter's trial,

and said, "as soon as I saw him I could identify him. I never would forget that face." The district court, which did not hear or observe Mrs. Geibel but read the transcript of her testimony at the state court trial, characterized it as,

"[T]he identification of defendant by an elderly witness whose direct observation of 'the stranger sitting at the desk' had lasted no longer than seconds, whose line-up identification of LiPuma had occurred under somewhat suggestive conditions, and whose husband, at the line-up, had been unable to identify LiPuma as 'the stranger' whom he had earlier observed during a significantly longer period than had his wife."

This court is in as good a position as the district court to judge from the record; and we cannot agree that the district court made a fair and accurate assessment of Mrs. Geibel and her testimony. On the contrary, this court is of the view that Mrs. Geibel, as a witness, independently furnished strong proof of the State's charge. Furthermore, the district judge's unsupported and unspecified view that the line-up was conducted under "somewhat suggestive conditions" must be assessed against the fact that Justice Fraiman, the trial judge, ruled, after a hearing, that the line-up identification was proper and admissible. Mr. Geibel's difficulty in recounting the events and in identifying the intruders was explained by the fact that he had just left the hospital after brain surgery and by the added factor that he was greatly shaken by the burglary.

In addition to Mrs. Geibel's identifications of the petitioner, the State offered the testimony of the three police officers, who made the arrest in Room 613, concerning the circumstances attendant upon those arrests. LiPuma argued that a pre-trial suppression motion should have been addressed to all of this testimony. As noted earlier, the

district court stated that it could not conclude, beyond a reasonable doubt, that "the motion, had it been advanced, would have ultimately failed." It is the opinion of this court, however, that the viability of LiPuma's suppression motion is quite to the contrary and that there was little or no likelihood that a suppression motion would have been granted as to those counts on which he was convicted.

It is also our view that the district court applied an improper standard in reviewing the likelihood of the suppression motion's success. In addition to holding without any supporting authority,³ that it could not conclude, "beyond a reasonable doubt" that LiPuma's suppression motion would have failed had it been made in a timely fashion, the court below ruled that there was a clear "reasonable possibility of prejudice to petitioner as a result of his counsel's glaring neglect . . ." *Rosner, supra*, 421 F. Supp. at 792. Traditionally, the burden of proof has been on the petitioner in a federal habeas corpus proceeding to prove, by a fair preponderance of the evidence, that his conviction must be vacated and his release ordered. The district court's use of a "beyond a reasonable doubt" standard to evaluate the merits of LiPuma's suppression motion confuses a measure of proof imposed upon the prosecution in establishing the elements of a crime where the issue before the trier of fact is the guilt or innocence of the defendant, with the measure of proof applicable in most

3 It is not entirely possible to sort out from the district court's findings and conclusions on the issue of prejudice the degree of reliance which the court placed upon the evidence at the habeas corpus hearing, which consisted entirely of testimony by defense lawyers saying in large measure what their respective defendants said to them. Though generally not objected to, it was largely hearsay and self-serving and of limited probative force. Of the three accused only Doyle took the witness stand, and this only in LiPuma's case, after Doyle, himself, had pled guilty. Doyle is, therefore, the only one whose personal testimony can be compared with that of his attorney who said what Doyle said to him. The latter includes a number of things not testified to by Doyle at the trial.

civil cases, including habeas corpus proceedings.⁴ See, *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092, 1097 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973); *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1085 (2d Cir.), cert. denied, 396 U.S. 847 (1969).

Further, as to the "reasonable possibility of prejudice" standard applied below, we are persuaded that the district court erred here as well. Given the high standards mandated in this Circuit for the review of a claim of ineffective assistance of counsel, see, *United States v. Wight, supra*, 176 F.2d at 379, and the maxim that "errorless counsel is not required," *United States v. Mantalon, supra*, 445 F.2d at 1218-19, the prejudice resulting from counsel's alleged neglect must be actual and not merely possible. This standard is consistent with *Wight* and *Mantalon, supra*, as well as with recent authority in this Circuit that where defendants claim that a potential conflict of interest on the part of their attorney prejudiced their cause, "some specific instance of prejudice" must be shown "before it can be said that an appellant has been denied the effective assistance of counsel." *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976) (citing cases.)

The State can point to the paucity of any evidence offered by the defendant, which called for suppression, particularly with respect to Counts 1 and 2 on which LiPuma was ultimately convicted. The State can also marshal in opposition to a suppression motion, the strong evidence, which was in its hands, that the warrantless entry into the room

4 If, however, the issue before the district court had been the substantive questions of whether a Fourth Amendment violation had taken place and whether the tainted testimony and evidence should have been suppressed in this case, the question of consent by Doyle to the entry into Room 613 would inevitably have arisen. In that event the burden would have been on the State to show that consent "was in fact voluntarily given and not the result of duress or coercion, express or implied." *Schneekloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

was made with Doyle's consent, that once Officer Donnelly was legitimately inside the room, he opened the closet door and observed that someone was resting his hand on the closet shelf, which justified the order for those hiding in the closet to come out. Raimondo and LiPuma were the two that emerged. The Geibel pillbox was then found in Raimondo's pocket.

The foregoing facts and testimony make clear that petitioner's suppression motion in the present case was not sufficiently supported and that failure to file this motion prior to trial did not constitute ineffective assistance of counsel under the Sixth Amendment. The resultant proceedings were thus a far call from "a farce and a mockery of justice," *United States v. Wight, supra*, 176 F.2d at 379, and there was no "total failure to present the cause of the accused in any fundamental respect," *United States v. Garguilo*, 324 F.2d 795, 796 (2d Cir. 1963). Moreover, to rule otherwise would go a long way towards affirmatively requiring defense counsel to file a suppression motion no matter how tenuous the grounds supporting it, for counsel's own protection if for no other reason. Counsel must be able to exercise professional discretion in deciding whether there are sufficient grounds for a potentially meritorious suppression motion. Such strategic and discretionary decisions are not lightly to be reexamined by courts whenever the defendant is convicted and a new or revived claim of ineffective assistance of counsel is raised, almost automatically, by the defendant. Indeed, it is ironic and paradoxical in the present case that petitioner protests so bitterly as to the admission of the policemen's damaging testimony that they found him hiding in the closet along with Raimondo as it bears on the *Geibel* burglary while he acknowledged in open court at his trial that the dismissal of the counts of the indictment relating to the

Robinson burglary, as to which the same police testimony was relevant and admissible, did not prejudice him. Moreover, both the State trial court and the United States District Court concluded that any fall-out or spill-over from the stricken evidence, presented under the dismissed Counts, four, five and six, was not prejudicial to LiPuma.⁵

We are also of the opinion that a full and fair consideration was given to all of the issues in this case by the courts of the State of New York and the case comes within the holding in *Stone v. Powell*, 428 U.S. 465 (1976).⁶

5 See also, *Wainwright v. Sykes*, — U.S. —, 45 U.S.L.W. 4807, 4811 (June 23, 1977), where the Court applied the rule of *Francis v. Henderson*, 425 U.S. 536 (1976), which barred federal habeas corpus review absent a showing of "cause" and "prejudice" attendant to a state procedural waiver, to a situation involving a waived objection to the admission of a confession at trial.

6 While *Stone v. Powell*, 428 U.S. 465 (1976), was decided over two months prior to the district court's decision in the present case, it was not considered by the court below. In *Stone*, the Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. at 494 (footnotes omitted). In the present case, the district court noted in its opinion that all three points in petitioner's federal habeas corpus petition, including the claim that LiPuma had been ineffectively assisted by counsel in violation of the Sixth Amendment, had been raised and argued before the state courts, *United States ex rel. Rosner v. Commissioner*, 421 F. Supp. 781, 783 (S.D.N.Y. 1976). Accordingly, LiPuma certainly was afforded an "opportunity for full and fair litigation" of his constitutional claim in the State courts, and *Stone* must be applied here as an additional ground for reversal of the district court's order.

The fact that petitioner's claim is ostensibly grounded on the Sixth, rather than the Fourth, Amendment does not negate *Stone's* applicability, because at the heart of this case lies an alleged Fourth Amendment violation. That is, should petitioner have succeeded in showing, in the state trial court, that the police entry into Room 613 was an unconstitutional search and seizure, the remedy decreed for such a violation would have been the exclusion of the allegedly "tainted" testimony of the police officers regarding the circumstances of LiPuma's arrest. The same remedy of exclusion is now sought by way of a collateral habeas corpus proceeding, where a Sixth Amendment claim has been added for good measure. The majority wrote in *Stone* that

That portion of the district court's order granting habeas corpus relief pursuant to 28 U.S.C. §2254 is reversed; that portion of the order denying relief as to the other issues raised by the appellant is affirmed. The petition for habeas corpus is, therefore, denied, and it is ordered dismissed.

"[o]ur decision today is not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right, see *supra*, [428 U.S.] at 486, and we emphasize the minimal utility of the rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding." 428 U.S. at 495, n. 37 (emphasis in original).

The above considerations apply to the substance of petitioner's Fourth Amendment claim underlying this case.

Moreover, the facts necessary to a full review of LiPuma's Fourth Amendment claim were fully developed at trial through the testimony of the police officers as well as Doyle. This testimony was part of the record on appeal of the conviction to the Appellate Division and the petition to the State Court of Appeals. In short, the substance of LiPuma's Fourth Amendment claim was before the New York courts throughout the prior proceedings in this case.

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Supreme Court, U. S.
FILED

SEP 9 - 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-232

THOMAS LIPUMA,

Petitioner,

against

COMMISSIONER, DEPARTMENT OF CORRECTIONS,
STATE OF NEW YORK, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR RESPONDENTS IN OPPOSITION
TO CERTIORARI**

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-4297/3385

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ALAN R. SHARETT
Assistant Attorney General
of Counsel

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—————
Opinions Below

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, — F. 2d —, Docket No. 77-2006, Slip Op. at 4657 (July 11, 1977)* reversing an order of the United

 * The Second Circuit's opinion is reproduced in petitioner's Appendix A, referred to herein in parentheses accompanied by small letters.

States District Court for the Southern District of New York granting a petition for a writ of habeas corpus unless within sixty days the New York state courts permitted petitioner to make a motion to suppress evidence.

The District Court issued two orders, dated September 24, 1976 and October 19, 1976, respectively and reproduced in *U.S. ex rel. Nancy Rosner on behalf of Thomas LiPuma v. Commissioner, New York State Department of Corrections*, 421 F. Supp. 781 (S.D.N.Y. 1976).

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

The Constitution of the United States provides in pertinent part:

Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

Amendment VI: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

Statutes Involved

Section 710.40, New York Criminal Procedure Law, provided in pertinent part:

"1. A motion to suppress evidence . . . must be made . . . prior to trial.

2. The motion may be made for the first time during trial when, owing to previous unawareness of facts

constituting the basis thereof or to other facts, the defendant did not have reasonable opportunity to make the motion before trial."

Questions Presented

1. Where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, may a state prisoner be granted federal habeas corpus relief on the ground that evidence in an allegedly unconstitutional search and seizure was introduced at trial?
2. Did petitioner waive his claim for purposes of federal habeas corpus review by failing to make a timely motion to suppress required by New York statute?
3. Was petitioner deprived of assistance of counsel because his lawyer failed to make a timely motion to suppress evidence even though petitioner's guilt was established beyond a reasonable doubt by positive in-court identification; the motion to suppress was of doubtful merit and counsel chose a different strategy as to the evidence; and petitioner's representation was otherwise forceful and effective?
4. Is there a conflict in federal circuits interpreting *Wainwright v. Sykes*?
5. Does the decision of the United States Court of Appeals for the Second Circuit, which is fully consistent with prior decisions of this Court, present any substantial federal question which warrants the exercise of this Court's jurisdiction?

Statement of the Case

Summary

On the night of January 10, 1972, Mr. & Mrs. Raymond Geibel returned to their suite in Manhattan's Berkshire Hotel to find petitioner LiPuma at the desk of the sitting room. Mrs. Geibel asked LiPuma to identify himself, and he replied that he was a hotel security officer investigating several reported burglaries in the hotel. Two more strangers emerged from the Geibel's bedroom, likewise claiming to be security men. Mr. Geibel asked the three men for identification. They replied that they did not have any with them and departed, leaving the Geibel's rooms in disarray. Mr. Geibel reported the incident to hotel authorities.

During the same evening, Mr. & Mrs. William Robinson returned to their suite in the Berkshire Hotel, finding it quite disturbed. Two fur coats, a leopard skin and a mink, some jewelry, including a diamond ring and gold cufflinks, and a pin were missing. Similarly, the Robinsons reported the incident.

Responding to a call from the hotel, police officers Robert Newham and John DeBona went to the Geibel's room. Obtaining a description of the three intruders, the two officers, joined by Detective William Donnelly, Patrolman Richard Powers, Patrolman James Greene and other officers searched the hallways and corridors. Next, Officers Donnelly, Powers, and Greene were directed by a superior to check out rooms 612 and 613.*

Reaching room 613, Detective Donnelly knocked, saying that it was the police and that "there had been a number of burglaries in the hotel and that we thought either this room

* Only the rooms on the sixth floor were used for transients. The other rooms were leased by long-term tenants.

was burglarized or possibly could be burglarized" and asked "could we come in." Patrolman Greene, standing next to Donnelly, heard "Yes" in response. The door was opened by James Doyle, whom Greene recalls telling Donnelly that it was "all right for him to come in and check the security of the premises", but not search him.

Inside the room, Donnelly noticed Doyle looking nervously toward the closet. Donnelly opened the door of the closet, saw a human hand on the shelf. Donnelly closed the door, saying "there's nothing there" and then motioned to his partners. The officers drew their weapons and ordered the closet's occupant to "come out with your hands up." Petitioner LiPuma then walked out of the closet, but the hand on the shelf remained. The command was repeated and Peter Raimondo came forth.

James Doyle denied any knowledge of the men in the closet, but the three were arrested. Doyle's hotel-room statement that he did not know petitioner LiPuma was later contradicted by Joyce Gersh, Doyle's girl friend who had seen Doyle with LiPuma and Raimondo on many occasions before the date of the robberies.

The pillbox taken in the Geibel break-in was found in Raimondo's pocket, together with the cufflinks taken from the Robinsons. On the bed in the room, the officers found a half-open attaché case containing the pin and the mink and leopard skins taken from the Robinson's room.

About an hour after the arrest, Helen Geibel identified LiPuma as one of the three intruders at a lineup in the police station. Mrs. Geibel also identified LiPuma at trial, "As soon as I saw him I could identify him. I never would forget that face."

LiPuma, Raimondo and Doyle were indicted on two counts of second degree burglary, petit and grand larceny, and two counts of criminal possession of stolen property—relating to the thefts in the Geibel room and in the Robin-

son room. Raimondo and Doyle pleaded guilty to reduced charges. LiPuma went to trial, where he was convicted of burglary in the second degree and petit larceny in connection with the Geibel burglary.

Petitioner LiPuma maintains before this Court that his Fourth Amendment rights were violated when the trial court refused to entertain a mid-trial motion to suppress all evidence derived from the January 10, 1972 search of room 613 at the Berkshire Hotel where he and Raimondo had been discovered in the closet, as well as where the physical evidence was found. Further, he maintains that his counsel's failure to make a timely motion to suppress, pursuant to New York Criminal Procedure Law § 710.40, deprived him of effective assistance of counsel. To properly evaluate petitioner's contentions, it is necessary to examine the efforts of defense counsel and the circumstances of the failure to make a timely motion to suppress.

The Defense

The defense hired John McNally, a private investigator, who interviewed Mrs. Geibel in Phoenix, Arizona. He testified that she told him that "the facts had left her and that she thought that the tallest of the three intruders was not at the Geibel's desk."* At trial, called as a defense witness, Mrs. Geibel reported that she admitted telling McNally that she was not sure, after a two and one-half year gap between the burglary and the interview, that she could identify LiPuma. However, she once again stated in open court, "his whole face came back to me" and that she was sure of LiPuma's identity as one of the robbers.

* LiPuma was the tallest of the three. Mrs. Geibel told McNally that she was positive of the identity of the man whom she had identified at the lineup.

James Doyle testified that LiPuma had been with him coincidentally earlier in the afternoon of the robbery and had visited him in his room later that evening. LiPuma, he said, had nothing to do with the robbery. He also stated, on cross-examination, that when the police came to his room, they "just barged in."

In addition to the above testimony,* petitioner's counsel, instead of showing incompetence, expended great efforts on behalf of LiPuma. Defense counsel made discovery motions to inspect the grand jury minutes and to dismiss the indictment. Defense was successful in obtaining a dismissal of four counts of a six count indictment and the exclusion of evidence relating to the Robinson robbery. Defense counsel interviewed arresting police officers before trial.

In the habeas corpus evidentiary hearing in the district court, defense counsel professed negligence and oversight for not moving to suppress before the state trial court. The attorneys maintained then and now that the motion to suppress was meritorious. Actually, at the outset of trial, the court inquired whether any pre-trial motions were pending, and counsel replied that the *only* such matter was a motion to suppress Mrs. Geibel's identification of LiPuma at a lineup. A hearing was held on this motion, which was then denied. Only after several of the People's witnesses had testified did counsel state that a motion to suppress physical evidence had been made on behalf of one of the codefendants and had also been joined in by LiPuma. An associate of defense counsel Coiro then indicated that he had orally joined in this motion when it was pending before another judge.

* Most of McNally's interview with Mrs. Geibel had been recorded and played to the jury. Defense counsel did a creditable job at trial—thoroughly hammering home the main defense that no evidence could be connected to petitioner and that he was a victim of mistaken identity. Their cross-examination of Mrs. Geibel was especially thorough and comprehensive.

Throughout the remainder of the trial, Justice Fraiman made exhaustive inquiries attempting to clarify the situation. He found that neither in the recollection of the court before whom the motion was allegedly made, nor in the recollection of the assistant district attorney was such a motion made—nor was such a motion in the official transcript or in writing. Also, because the “facts which could have formed the basis for such motion were readily available to defendant prior to trial,” the court declined to entertain the motion. Later, during sentencing, LiPuma asked for a hearing to prove that counsel had told him that he was moving to suppress physical evidence; the application was denied.

It should be noted that counsel had objected to the admission of the pillbox on the ground that it had never been connected to the petitioner, and it was admitted “subject to connection”. Counsel did not mention that the pillbox was unlawfully seized. And counsel’s motion to dismiss the indictment was largely based on the People’s failure to prove petitioner had possessed the Geibel pillbox, or evidence relating to the Robinson burglary. It is thus apparent that defense counsel did not then believe that they had a meritorious motion to suppress. In fact, petitioner’s first counsel admitted that the chance of success on the motion might be “tough”. Subsequent defense counsel stated that there might be a “problem” in proving the motion. Trial defense counsel agreed that the motion would be “illfated.” The assistant district attorney said he and the defense counsel had thought the motion “inappropriate.”

The trial court noted that the failure to make the motion to suppress was not as significant as it would appear to defense counsel.

Reasons for Denying the Petition for Certiorari

The decision of the United States Court of Appeals is entirely consistent with the decisions of this Court and presents no substantial federal question which warrants review by this Court.

A.

In *Stone v. Powell*, 428 U.S. 465 (1976), this Court repeatedly held that habeas relief may not be afforded to a state petitioner who has had an *opportunity* for full and fair litigation of his Fourth Amendment claim. Petitioner argues that since the trial court did not reach the merits of his mid-trial suppression motion, he was denied such an opportunity. However, he confuses actual litigation with the opportunity to litigate.

In *Stone*, this Court decided that the purpose of the exclusionary rule, deterrence, was too minimal a concern to support its application in a federal collateral proceeding. 428 U.S. at 486-488. This reasoning is unaffected by whether a petitioner litigated his claim or merely had the opportunity to litigate, which he forewent, regardless of the reason. See *Gates v. Henderson*, — F. 2d — (2d Cir. August 19, 1977) (Slip Op. 5361) (*en banc*). Although petitioner attempts to make out a Sixth Amendment ineffectiveness of counsel claim, the Court of Appeals clearly recognized that “at the heart of this case lies an alleged Fourth Amendment violation.” (19a n. 6).

LiPuma had the opportunity to raise his search and seizure claim pretrial, which he failed to do, or during trial, which he did and lost.

Further, as the Second Circuit stated, LiPuma’s counsel developed all the facts irrelevant to the Fourth Amendment claim at trial (20a n. 6). Since the trial testimony was part of the record on petitioner’s direct appeal, the

substance could have been presented to the state appellate courts.*

Although *Stone* is dispositive, petitioner invokes the holding of *Williams v. Georgia*, 349 U.S. 375 (1955). *Williams* states at 25, "A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim [pursuant to a state procedural rule] while passing upon kindred issues raised in the same manner" (Emphasis added). Petitioner maintains that § 710.40, New York Criminal Procedure Law ("NYCPL"), which requires motions to suppress evidence be made prior to trial, was improperly imposed to defeat an obviously meritorious federal claim.

Petitioner makes two false interpretations. First, he views § 710.40 as discretionary. Second, he views his claim as "obviously" meritorious. These points are disputed by the facts and law, as is discussed in the careful and well-reasoned opinion of the Second Circuit (9a-12a).

Section 710.40 provides an exception when, "owing to previous unawareness of facts constituting the basis thereof or to other factors, the defendant did not have reasonable opportunity to make the motion before trial." This exception is totally inapplicable herein. Petitioner's counsel fully developed his Fourth Amendment claim at trial in the strategic manner he chose. Also, immediately preceding the commencement of trial, the state trial judge asked Attorney Coiro if "there was any outstanding motion" he required. Coiro replied "that there were not," § 710.40 was not subject to discretionary application. An exception to its prohibition was not present.

United States ex rel. Tarallo v. LaVallee, 433 F. 2d 4 (2d Cir. 1970), cert. denied 403 U.S. 919 (1971), forecloses re-

* Petitioner's conviction was affirmed without opinion by the Appellate Division, First Department, and leave to appeal to the New York Court of Appeals was denied.

view (as does *Stone, supra*). In *Tarallo*, failure to comply with § 813-d of New York Code of Criminal Procedure, § 710.40's predecessor, foreclosed federal habeas corpus relief.* As the Second Circuit points out, after LiPuma's trial New York enacted NYCPL § 255.20, dealing with general procedure on all pretrial motions. It states that the court "in the interest of justice and for good cause shown, may, in its discretion, at any time before sentence, entertain and dispose of the [pre-trial] motion on the merits" (11a-12a; emphasis added). The passage of § 255.20 supports the view that there was the prior lack of discretion to hear a suppression motion not made prior to trial.

The facts herein, as set forth in the Statement of the Case, *supra*, and in the Second Circuit's opinion, cannot support petitioner's contention that his claim was "obviously meritorious."

B.

Petitioner mistakenly places reliance on *Wainwright v. Sykes*, — U.S. —, 45 U.S.L.W. 4807 (June 23, 1977) for his claim for relief.

Wainwright, recognizing the Court's willingness to modify its earlier views of the writ, overturned the deliberate bypass rule of *Fay v. Noia*, 372 U.S. 391 (1963), and applied the rule of *Francis v. Henderson*, 425 U.S. 536 (1976), barring habeas corpus review absent a showing of cause for non-compliance and of actual prejudice resulting from a constitutional violation, in cases of procedurally waived objections to the admission of a confession at trial.

At p. 4813, the Court in *Wainwright* concludes, "the other evidence of guilt presented at trial, moreover, was

* The Circuit Court observes at 11a, "A comparison of § 813-d of the Code of Criminal Procedure (reproduced at 433 F. 2d at 7, n. 4) with NYCPL § 710.40 as it stood in May of 1974 (the time of LiPuma's trial—§ 710.40 was thereafter amended twice, on September 1, 1974 and September 1, 1976) reveals little if anything by way of substantive difference between the two provisions."

substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent . . .” As the Second Circuit states, the “facts and testimony make clear that petitioner’s suppression motion was not sufficiently supported” (18a). See Statement of Facts, *supra*. Petitioner points to the district court finding of evidence “sufficiently weighty so that its exclusion from the case was not harmless beyond a reasonable doubt.” The Second Circuit disposes of this ill-founded argument (16a-20a), observing that the use of a “beyond a reasonable doubt standard” “confuses a measure of proof imposed upon the prosecution in establishing the element of a crime where the issue before the trier of fact is the guilt or innocence of the defendant, with the measure of proof applicable in most civil cases, including habeas corpus [citations omitted]” (16a-17a).

Petitioner cites *Poulin v. Gunn*, 548 F. 2d 1379 (9th Cir. 1977) and *Vitello v. Gaughan*, 544 F. 2d 17 (1st Cir. 1976), in support of his contention that there is a conflict in circuits concerning the *Wainwright* case. *Poulin*, handed down prior to *Wainwright*, employs the bypass rule of *Fay v. Noia*, *supra*, subsequently abandoned in *Wainwright*. *Vitello* also was decided prior to *Wainwright*. Since both circuit cases were rendered prior to *Wainwright*, petitioner obviously errs in the contention that there is a present existing conflict.

C.

The Second Circuit in *United States v. Yanishefsky*, 500 F. 2d 1327, 1333 (1974), reiterated that “the current standard of ineffective assistance of counsel in this circuit is that in order to be of constitutional dimensions, the representation be so ‘woefully inadequate’ as to shock the conscience of the Court and make the proceedings a farce and mockery of justice”, quoting *United States v. Wight*, 176 F. 2d 376, 379 (2d Cir. 1949). The Court further

observed that errorless counsel is not required and that there must be a “total failure to present the cause of the accused in any fundamental way, *United States v. Garquilo*, *supra*, 374 F. 2d at 796, quoting *Brubaker v. Dickson*, 310 F. 2d 30, 39 (9th Cir. 1972), *cert. denied* 372 U.S. 978 (1963).” Examining the facts of the case, the strength of the prosecution’s case, and the diligence of defense counsel, it is impossible to deem this a case of ineffective counsel pursuant to Second Circuit standards. See Statement of Case, as well as Second Circuit opinion, 12a-19a.

Petitioner’s reference to Mr. Justice Brennan’s concurring opinion (actually, the concurrence of Mr. Justice White), endorsing a reasonable competence standard, is neither supported by Justice White’s language nor intent.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York, September 7, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ALAN R. SHARETT
Assistant Attorney General
of Counsel